

Office: Supreme Court, U.S.  
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ALEXANDER L. STEVENS,  
CLERK

NO. 83-128

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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UNITED STATES OF AMERICA, Petitioner,

vs.

WILLIAM GOUVEIA, et al., Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRIEF OF RESPONDENT PHILIP SEGURA IN OPPOSITION

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1                           QUESTIONS PRESENTED

2  
3         1. Whether the 6th Amendment requires prison  
4         officials to provide counsel at any time prior to indictment  
5         for indigent federal prisoners, who have been isolated in  
6         administrative detention pending investigation and trial.

7         2. Whether the confinement of an indigent federal  
8         prisoner for 19 months in administrative detention without the  
9         assistance of counsel, while the Government prepared its case  
10        for trial, so prejudiced defendants' right to a fair trial  
11        that dismissal of the indictment was the only appropriate  
12        remedy.

13

14                           PARTIES TO THE PROCEEDING

15  
16         In addition to the parties shown by the caption of  
17         this case, Robert Ramirez, Adolfo Reynoso, Philip Segura,  
18         Robert Eugene Mills and Richard Raymond Pierce were appellants  
19         below and are respondents here. Mills and Pierce were defen-  
20         dants in a case unrelated to the other respondents. Following  
21         District Court convictions, the cases of all six (6) respon-  
22         dents were consolidated to consider the issues presented  
23         above.

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45 October Term, 1983  
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1213  
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15 TO THE UNITED STATES COURT OF APPEALS  
16 FOR THE NINTH CIRCUIT  
1718 BRIEF OF RESPONDENT PHILIP SEGURA  
19 IN OPPOSITION TO PETITION FOR WRIT  
20 OF CERTIORARI21 OPINION BELOW  
2223 The opinion of the Court of Appeal, sitting en  
24 banc, is reported at 704 F.2d 1116 (9th Cir. 1983).  
2526 JURISDICTION  
2728 The judgment of the Court of Appeals was entered on  
29 April 26, 1983. The Petition for Writ of Certiorari was filed  
30 by the Government on July 25, 1983 after being granted an  
31 extension of time. The jurisdiction of the Court is invoked  
32 under 28 U.S.C. § 1254(1).  
33

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**STATEMENT**

On November 11, 1978, an inmate named Thomas Trejo was murdered at the Federal Correctional Institution at Lompoc, California. He was stabbed to death in Cell A-18 of Unit M at that Institution.

On the evening of November 11, 1978, three of the originally charged defendants in this case, to wit: Adolfo Reynoso, Pedro Flores (since acquitted) and William Gouveia were placed in the Administrative Detention Unit (ADU) of the Institution. On November 22, 1978, these three individuals were released from the ADU following a brief investigation of this murder and returned to the general prison population. Thereafter, on December 4, 1978, the F.B.I. and prison authorities made a determination concerning who was responsible for the death of Thomas Trejo and on that date placed respondent Adolfo Reynoso, William Gouveia, Robert Ramirez, Philip Segura and two other individuals, Pedro Flores and Steven Kinard into solitary confinement in the ADU. These six individuals were the primary suspects in the Trejo murder.

On June 17, 1980, approximately twenty months later, these individuals were indicted for the murder of Thomas Trejo. They were initially brought to the Court for arraignment on this indictment on July 14, 1980. Throughout the intervening twenty-month period, these respondents remained in solitary confinement without the assistance of counsel or the ability to communicate with prisoners in the general prison population who might know something about the crime.

11

111

1            Respondent Philip Segura, as well as the other respon-  
2 dents, requested the assistance of a lawyer in connection with  
3 prison disciplinary proceedings connected with the Thomas Trejo  
4 murder. This occurred in the month of December of 1978 when  
5 Segura was first placed in the Administrative Detention Unit.  
6 His request for the appointment of assistance of counsel in  
7 connection with the disciplinary proceedings and to assist him in  
8 defending himself on the allegations against him was denied.  
9 Segura went to a prison disciplinary hearing in December, 1978  
10 and was found guilty of the murder with a subsequent deprivation  
11 of good time credits and other penalties. At no time in prepara-  
12 tion for this hearing or in the twenty months of solitary confine-  
13 ment that followed was Segura afforded the assistance of counsel.  
14 This was done for the first time at his arraignment on the  
15 indictment in July of 1980.

16           During the intervening twenty months, Segura not only  
17 suffered the typical dimming of memories with respect to the  
18 facts of this case but also lost, through natural death, the  
19 availability of several witnesses who could have testified in his  
20 defense. He lost at least two alibi witnesses, as well as the  
21 availability of a person who at trial appeared to be another  
22 likely suspect who could have committed this murder to the  
23 exclusion of appellant Segura and his co-defendants. All of  
24 these individuals died by natural death during the intervening  
25 period referred to above.

26           Moreover, as the moving papers in a motion to dismiss  
27 filed in the District Court showed, counsel for Segura and the  
28 other defendants were severely hampered in their ability to inve-  
29 stigate and defend against these charges by the passage of time  
30 and the unique problems such passage of time causes within the  
31 prison system in a case such as this. More specifically, the  
32 prison system is replete with transfers of prisoners, knowledge

1 of prisoners only through nicknames and actual release of pri-  
2 soners from the prison system itself. By the time counsel were  
3 appointed to represent Segura and his co-defendants, many of the  
4 persons who knew anything about the crime back in November of  
5 1978 were either outside the prison system and unable to be  
6 located, transferred within the prison system and unable to be  
7 located or their identities were unknown because they were only  
8 known through nicknames and were no longer present at Lompoc  
9 where they could be interviewed.

10 The Court of Appeal, sitting en banc, agreed with the  
11 contentions of appellant Segura and his co-defendants that the  
12 fact depicted above constituted a deprivation of Segura's right  
13 to counsel under the Sixth Amendment of the United States Constitu-  
14 tion. The Court also appropriately felt that the only remedy  
15 for this violation was dismissal of the indictment. It therefore  
16 reversed the convictions and ordered that the indictment against  
17 each of the appellants be dismissed.

18

19 ARGUMENT

20

21 In this case, the Court of Appeal for the Ninth Circuit  
22 held that the lengthy pre-indictment isolation without the  
23 assistance of counsel irrevocably prejudiced the ability of the  
24 respondents to prepare an effective defense and thus unconstitu-  
25 tionally deprived them of their Sixth Amendment right to counsel  
26 and to a fair trial. Since the Government's conduct in this case  
27 resulted in harm which was not capable of after-the-fact remedy,  
28 the Ninth Circuit ruled that respondents were in a position  
29 similar to suspects who were denied a speedy trial and thus  
30 dismiss the indictment as the only available remedy. United  
31 States v. Gouveia, 704 F.2d 1116, 1125-27 (9th Cir. 1983).

32 ///

1           The Solicitor General now seeks the granting of a  
2 petition for a Writ of Certiorari. It is well established  
3 that such a writ is "not a matter of right, but of judicial  
4 discretion, and will be granted only where there are special  
5 and important reasons therefor." Supreme Court Rule 17.1.  
6 Upon examination of the opinion of the Court of Appeal for  
7 the Ninth Circuit, that opinion is merely a natural exten-  
8 sion of prior decisions of the Supreme Court and strikes a  
9 reasonable balance between the constitutional rights of  
10 indigent federal inmates and the needs of the correctional  
11 institutions. Therefore, the scarce decisional resources of  
12 the Supreme Court should be confined to more important  
13 matters that justify review by certiorari and the instant  
14 petition should therefore be denied.

15

16           A.    THE SIXTH AMENDMENT REQUIRES APPOINTMENT  
17                   OF COUNSEL TO INDIGENT INMATES WHO HAVE  
18                   BEEN ISOLATED FROM THE GENERAL PRISON  
19                   POPULATION PENDING INVESTIGATION AND PROSECUTION.

20

21           Although lawful imprisonment may curtail many rights  
22 and privileges afforded other citizens, the prisoner is not  
23 wholly without constitutional protection when he is imprisoned  
24 for a crime. "There is no iron curtain drawn between the Constitu-  
25 tion and the prisons of this country." Wolff v. McDonnell, 418  
26 U.S. 539, 555-56 (1974). To determine which constitutional  
27 rights will survive imprisonment, and to what extent these rights  
28 will be available to the prisoner, one must find a point of  
29 mutual accommodation between institutional needs and objectives  
30 and the provisions of the Constitution which are applicable. Id.  
31 The decision of the Court of Appeals for the Ninth Circuit  
32 reached such a mutual accommodation by structuring a rule based

1 on existing prison regulations. The rule will provide  
2 indigent inmates with needed legal counsel only when deten-  
3 tion is in contemplation of criminal prosecution, thus,  
4 preserving the inmates' Sixth Amendment right to counsel with a  
5 minimal intrusion into the prison disciplinary proceedings.

6           The Court of Appeals for the Ninth Circuit held that if  
7 an inmate is confined in isolation for more than 90 days, the  
8 maximum disciplinary period provided in the prison regulations,  
9 he should be allowed to show, and it is in fact presumed, that  
10 his detention is due to a pending investigation or trial for a  
11 criminal act. United States v. Gouveia, 704 F.2d 1116, 1124 (9th  
12 Cir. 1983). This holding clearly permits the continued detention  
13 of an inmate for prison disciplinary reasons, if the prison  
14 officials can show that the inmate is not being held pending a  
15 criminal investigation. The Solicitor General, in his petition  
16 for certiorari, makes several unfounded and misleading arguments  
17 to the effect that the decision below will have significant  
18 practical consequences for the administration of federal and  
19 state prisons.

20           To avoid claims such as the ones made by the Solicitor  
21 General, the Court below set forth specific procedures which must  
22 be met before an indigent prisoner may obtain appointed counsel  
23 prior to indictment. The Court held:

24           "The inmate must ask for an attorney,  
25 establish indigency, and make a prima  
26 facie showing that one of the reasons  
27 for continued detention is the investi-  
28 gation of a felony. At that point  
29 prison officials must either refute the  
30 inmate's showing, appoint counsel, or  
31 release the inmate back into the general  
32 prison population." Id.

1           Thus, the Solicitor General's claim that other inmates  
2 who have been held over 90 days in administrative detention will  
3 automatically have to be released into the general prison popula-  
4 tion or will escape criminal penalties entirely as a result of  
5 the decision below is clearly without merit. The use of such an  
6 unwarranted argument to alarm this Court to grant certiorari  
7 should be exposed and rejected.

8           In addition, the Solicitor General argues that the  
9 opinion below cannot stand because it is in direct conflict with  
10 the holding in Kirby v. Illinois, 406 U.S. 682 (1972). The Court  
11 in Kirby concluded that the 6th "Amendment right to counsel  
12 attaches only at or after the time that adversary judicial  
13 proceedings have been initiated" against a person. Id. at 688.  
14 This point in time may arise "by way of formal charge, preli-  
15 minary hearing, indictment, information, or arraignment." 406  
16 U.S. at 689.

17           However, neither Kirby, nor any of the cases cited  
18 therein, dealt with the confinement of a prisoner and when his  
19 right to counsel should attach. The initiation of the adversary  
20 judicial proceeding was determined to be the point in time when  
21 the right to counsel should attach to free citizens in order to  
22 adequately protect their constitutional rights. This rule was  
23 not designed with the prison environment in mind and thus cannot  
24 be mechanically applied to such a situation without some modifi-  
25 cation. The court in Wolff v. McDonnell, 418 U.S. 539, 566  
26 (1974), recognized the unique situation facing prisoners in  
27 disciplinary proceedings and concluded:

28           ". . . [O]ne cannot automatically apply  
29 procedural rules designed for free citizens  
30 in an open society, or for parolees or  
31 probationers under only limited restraints,  
32 to the very different situation presented

1 by a disciplinary proceeding in a state  
2 prison."

3

4 The Sixth Amendment guarantees that "in all criminal  
5 prosecutions, the accused shall enjoy the right . . . to have the  
6 Assistance of Counsel for his defense." When one examines the  
7 factual scenario surrounding the lengthy confinement of the  
8 Respondent in the instant case, there can be no doubt but that he  
9 was an "accused" within the meaning of the 6th Amendment, and  
10 thus entitled to assistance of counsel.

11 The Respondent Segura and his three co-defendants were  
12 placed in solitary confinement for almost two years without the  
13 assistance of counsel, despite repeated requests for aid from  
14 counsel, while the Government and the F.B.I. slowly and methodi-  
15 cally conducted their investigation and prepared their case for  
16 trial. Within the first month of solitary confinement, prison  
17 officials conducted a disciplinary hearing at which time Respon-  
18 dent was found guilty of the murder of Thomas Trejo. As a  
19 result, Respondent was sentenced to solitary confinement and lost  
20 his accumulated good time credit.

21 Federal prison regulations provide that a maximum stay  
22 in isolation for disciplinary purposes is ninety days. 28 C.F.R.  
23 § 541.11 (1982). Yet Respondent and his co-defendants were held  
24 in solitary confinement for 20 months prior to being indicted.  
25 This suggests that the 16 months over and above the maximum  
26 three-month disciplinary confinement was in contemplation of  
27 criminal prosecution, which was presumed by the Court of Appeal  
28 and never refuted. Since Respondent had been found guilty of the  
29 murder by prison authorities and was suffering a significant loss  
30 of his liberties due to a pending criminal investigation, the  
31 initiation of the adversary judicial proceedings had surely  
32 begun.

1           In United States v. Wade, 388 U.S. 218, 224 (1967),  
2 this court stated that:

3           "[O]ur cases have construed the Sixth  
4 Amendment guarantee to apply to 'critical'  
5 stages of the proceedings . . . . The plain  
6 wording of this guarantee thus encompasses  
7 counsel's assistance whenever necessary to  
8 assure a meaningful 'defense'."

9  
10 Respondents clearly lacked a meaningful defense as a result of  
11 being denied the aid of counsel for almost two years. While the  
12 Government and the F.B.I. gathered testimony and preserved  
13 evidence, Respondent was forced to sit in solitary confinement  
14 without the aid of learned legal counsel.<sup>1</sup> Twenty months later  
15 the Government completed its thorough investigation and indicted  
16 Respondent. Only then was Respondent appointed counsel. How-  
17 ever, at this point the critical initial stage of investigation  
18 was forever lost to Respondents. Memories had faded, witnesses  
19 were lost or had died and physical evidence essential to Respon-  
20 dents' case had deteriorated. Clearly the confinement of Respon-  
21 dent pending state criminal investigation was the initial criti-  
22 cal stage in the prosecution. The court in Wade, supra, con-  
23 cluded that:

24           ///

25           ///

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28           

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<sup>1</sup> It must be noted that a non-indigent inmate placed in solitary  
29 confinement could hire counsel at the initial stages of inve-  
30 stigation to preserve his right to a fair trial. Respondents  
31 lack of effective assistance of counsel and his resultant unfair  
32 trial were due solely to his indigency.

1        "[T]he accused is guaranteed that he need not  
2        stand alone against the State at any stage of  
3        the prosecution, formal or informal, in court  
4        or out, where counsel's absence might derogate  
5        from the accused's right to a fair trial (foot-  
6        note omitted)." 388 U.S. at 226.

7

8        The Court of Appeals for the Ninth Circuit held that  
9        Respondents' lack of counsel during the critical initial stages  
10      of investigation unconstitutionally obstructed the ability of  
11      Respondent to receive a fair trial.

12       The Solicitor General argues that the right to counsel  
13      should not apply to the present case since this is the pre-  
14      indictment, investigatory stage of the prosecution. Although  
15      generally the case, this argument does not hold true for every  
16      situation.

17       In Miranda v. Arizona, 384 U.S. 436 (1966), this Court  
18      recognized the persuasive realities of the custodial interroga-  
19      tion and afforded the suspect the right to appointed counsel in  
20      such situations. Two years later, in Matthis v. United States,  
21      391 U.S. 1 (1968), this Court held that the interrogation of an  
22      incarcerated suspect, whether or not intended to obtain evidence  
23      for a criminal prosecution and whether or not related to the  
24      offense for which the inmate questioned has been imprisoned, is a  
25      "custodial interrogation" under Miranda v. Arizona. This court  
26      granted the right to counsel during the interrogation even though  
27      the institution of adversary judicial proceedings had not yet  
28      occurred and despite the fact that the confrontation was only  
29      investigatory.

30       The decision below, viewed in light of the foregoing  
31      authorities, is clearly in line with this Court's previous  
32      decisions, and is designed to protect the inmate's constitutional

1 right to counsel in the unique situation presented by the instant  
2 case.

3

4 B. DISMISSAL OF THE INDICTMENT IS THE ONLY  
5 PROPER REMEDY TO NEUTRALIZE THE PREJUDICE  
6 SUFFERED BY RESPONDENT.

7

8 The Solicitor General claims that, even assuming  
9 arguendo that there has been a Sixth Amendment violation,  
10 dismissal of the indictment is an inappropriate remedy. In  
11 support of this contention the Solicitor General relies on two  
12 points; one, that dismissal of an indictment is a drastic remedy  
13 that is rarely appropriate, United States v. Blue, 384 U.S. 251,  
14 255 (1966), and two, that dismissal is inappropriate in the  
15 absence of any specific showing of prejudice resulting from the  
16 failure to appoint counsel.

17 1. In the recent case of United States v.  
18 Morrison, 449 U.S. 361 (1981), this Court examined the possibi-  
19 lity of dismissal in the event of a violation of the Sixth  
20 Amendment's right to counsel. This Court adopted the following  
21 approach in order to aid in the selection of a proper remedy:

22 "Our approach has thus been to identify and  
23 then neutralize the taint by tailoring relief  
24 appropriate in the circumstances to assure  
25 the defendant the effective assistance of  
26 counsel and a fair trial." Id. at 365.

27

28 \* Although the Court in Morrison denied the remedy of  
29 dismissal for the Sixth Amendment violation which occurred  
30 therein, they did not rule out the possibility of granting a  
31 dismissal under the appropriate circumstances. This Court  
32 concluded in essence that if there was demonstrable prejudice, or

1       a substantial threat thereof, then dismissal of the indictment  
2       would be appropriate. Id.

3                  The instant case, as noted by the Court below, presents  
4       a compelling set of circumstances which justifies the remedy of  
5       dismissal. The denial of counsel to the Respondent during the  
6       initial critical stage of investigation, while the events sur-  
7       rounding the murder were fresh in the minds of all those  
8       involved, and for the twenty months thereafter, so permanently  
9       prejudiced Respondent's defense that a fair trial could not be  
10      had. Thus, in order to neutralize the substantial, permanent  
11      prejudice suffered by Respondent, the Court below was left with  
12      no alternative but to dismiss the indictment.

13                 2. The Solicitor General also argues that there  
14       must be some specific showing of prejudice resulting from the  
15       constitutional violation in order to justify dismissal. This  
16       contention is clearly erroneous in light of this Court's decision  
17       in Moore v. Arizona, 414 U.S. 25, 26 (1973). There the court  
18       confirmed its earlier decision in Barker v. Wingo, 407 U.S. 514  
19       (1972) that an affirmative demonstration of prejudice was not  
20       necessary in order to prove a denial of the constitutional right  
21       to a speedy trial. Id. at 26.

22                 "We regard none of the four factors identified  
23       above [length of delay, reason for delay, defen-  
24       dant's assertion of his right, and prejudice to  
25       the defendant] as either a necessary or sufficient  
26       condition to the finding of a deprivation of the  
27       right of speedy trial. Rather, they are related  
28       factors and must be considered together with such  
29       other circumstances as may be relevant. In sum,  
30       these factors have no talismanic qualities; courts  
31       must still engage in a difficult and sensitive  
32       balancing process. But, because we are dealing with

1           a fundamental right of the accused, this process  
2           must be carried out with full recognition that the  
3           accused's interest in a speedy trial is specifically  
4           affirmed in the Constitution." 407 U.S. at 533.  
5

6           Similarly, an affirmative demonstration of prejudice is not  
7           necessary to prove the denial of the constitutional right to have  
8           effective assistance of counsel for a defense.

9           Even assuming this were not the case, the Respondent  
10          clearly demonstrated that he had suffered a substantial prejudice  
11          as a result of his being denied counsel. Critical alibi wit-  
12          nesses and other crime suspects were lost during the inordinant  
13          delay through death or the inability to be located. This fact,  
14          in itself is sufficient to deny Respondent a fair trial. More-  
15          over, as noted by the Court below, it was a significant fact that  
16          the government was unable to rebut Respondent's showing of  
17          potential prejudice.

18           As a result of foregoing demonstration, and in light of  
19          the fact that this Court has been responsive to claims that the  
20          government's conduct has rendered counsel's assistance to the  
21          defendant ineffective, it is clear that the scales of justice  
22          weigh more heavily in favor of dismissal of the indictment in the  
23          instant case.

24          ///

25          ///

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31          ///

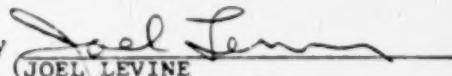
32          ///

1                   CONCLUSION  
2

3                   For all of the foregoing reasons, it is hereby respect-  
4       fully requested that the Solicitor General's Petition for Certi-  
5       orari be denied.

6                   Respectfully submitted,

7                   STILZ, BOYD, LEVINE & HANDZLIK  
8                   A Professional Corporation

9                   By   
10                  JOEL LEVINE  
11                  Attorneys for Respondent  
12                  PHILIP SEGURA

1

2                   PROOF OF SERVICE BY MAIL

3

4                   I affirm that I am a United States citizen, over 18  
5                   years of age, and not a party to the within action. I am  
6                   employed in Los Angeles County, California, at 2049 Century Park  
7                   East, Suite 1200, Los Angeles, California 90067, by Joel Levine,  
8                   a member of the Bar of this Court, at whose direction the service  
9                   of mail described herein was made.

10                  On September 20, 1983, I served the within PETITION FOR  
11                  A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
12                  THE NINTH CIRCUIT on the interested parties in said action by  
13                  depositing a true copy thereof enclosed in a sealed envelope with  
14                  postage thereon fully prepaid in a mailbox regularly maintained by  
15                  the Government of the United States, at Los Angeles, California,  
16                  addressed as follows:

17                  Rex E. Lee, Solicitor General  
18                   Department of Justice  
19                   Washington, D.C. 20530  
20                   Attention: John F. De Pue, Attorney

21                  Manuel Araujo, Attorney at Law  
22                   453 South Spring Street, Suite 1017  
23                   Los Angeles, California 90013

24                  Charles Diamond, Esq.  
25                   O'Melveny & Meyers  
26                   611 West Sixth Street  
27                   Los Angeles, California 90017

28                  Edwin S. Saul, Attorney at Law  
29                   15760 Ventura Boulevard  
30                   Encino, California 91436

31                  Michael J. Treman, Attorney at Law  
32                   105 East De La Guerra, Suite 5  
33                   Santa Barbara, California 93101

34                  Joseph F. Walsh, Attorney at Law  
35                   316 West Second Street, Suite 1200  
36                   Los Angeles, California 90012

37                  I declare under penalty of perjury that the foregoing  
38                  is true and correct.

39                  Dated this 20th day of September, 1983, at Los Angeles,  
40                  California.

41                     
42                   DIANE J. WELHOUSE